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No. 55

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FILED
DEC 18 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner

v.

AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

On November 23, 1964, this Court rendered a per curiam opinion in this case affirming the judgment below by an equally divided vote (Mr. Justice Goldberg not participating). At the time that decision was rendered, there was pending in this Court a petition for certiorari in *General Elec. Co.* v. *International Union of Elec. Workers,* No. 413, This Term, in which certiorari was sought on the ground (among others) that the Second Circuit's decision in *General Electric* was in conflict with the Seventh Circuit's decision in the present case. On December 7, 1964, this Court denied certiorari in *General Electric.*

As the result of these two decisions, the law has been left in a state of confusion. The Court's decision disposes of the present litigation, but it sheds no light on the legal issues which are here involved. Since the parties have a continuing collective bargaining relationship, in which the issues involved in this case are bound to arise in the future,

the undersigned counsel have been asked to file this Petition for Rehearing in the hope that some means might still be found for resolving those issues in this case, and thereby avoiding wasteful future litigation which would inevitably have a disruptive effect on the parties' continuing collective bargaining relationship.

We recognize that rehearing is rarely granted by this Court. We believe, however, for the reasons set forth below, that this is an appropriate case for rehearing.

I. A CRITICAL FACT, NOT STRESSED IN THE BRIEFS OR THE ORAL ARGUMENT, MAY WELL HAVE BEEN OVERLOOKED BY THE JUSTICES WHO VOTED TO AFFIRM THE DECISION BELOW.

The absence of any opinion in this case makes it difficult to determine on what basis four Justices of this Court voted to affirm the decision below. The denial of certiorari in the *General Electric* case, however, suggests that there are not four Justices who are ready to depart from the basic principles established in *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 593 (1960) and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 633 (1960). Accordingly, the decision in this case must have been based on facts which were not present either in the *General Electric* case or the *American Manufacturing* and *Warrior & Gulf* cases.

The one fact which distinguishes the present case from these others is that the issue involved in the present case was previously litigated between the parties in an earlier case involving a similar grievance under an earlier agreement. The Company argued that the earlier adjudication was binding as a matter of collateral estoppel in the present case. We are satisfied that we fully answered that argument in our briefs. But in addition to urging that the earlier decision was binding as a matter of collateral estoppel, the Company also argued that the re-execution of

a new collective bargaining agreement subsequent to the prior decision constituted a sort of ratification by the parties of the interpretation of the contract which the Seventh Circuit had placed on it in the prior case.

It is in connection with this argument, which may well have influenced one or more Justices to vote for affirmance, that we wish to bring to the Court's attention a critical fact which we did not previously stress. That fact is that the grievance in the present case arose *before* any new agreement had been adopted.

The sequence of events is as follows: The earlier case was decided by the Seventh Circuit on March 2, 1960. The contract which was then in effect between the parties was to expire on August 15, 1960. On June 20, 1960, this Court decided the *American Manufacturing* and *Warrior & Gulf* cases, setting forth, for the first time, the standards which would apply in the determination of the "arbitrability" question. On August 10, 1960, the parties agreed to extend their agreement "subject to cancellation by either party upon giving to the other of seventy-two hours' notice." This extension remained in effect until December 22, 1960. (R. 26) On that date, a new agreement between the parties became effective.

The grievance involved in this case arose on October 25, 1960, during the extension period, and before a new contract was executed. (R. 19)

When a collective bargaining agreement is about to expire, and the parties wish to continue their negotiations for a new agreement without a strike, the common practice is to continue the old agreement in effect on a day-to-day basis. Such an interim extension does not indicate that the parties are satisfied with the terms of the old agreement. Indeed, it indicates just the contrary, since the whole purpose of such an extension is to provide a period of time within which the parties may negotiate a new agreement. Plainly, that was the situation here, since the extension was

subject to cancellation upon 72 hours' notice, and was shortly followed by the execution of a new agreement.

Neither party has previously brought to this Court's attention, either in the briefs or in the oral argument, the fact that the extension agreement under which this case arose was subject to cancellation upon 72 hours' notice. That fact, which may well have been overlooked by the Court, clearly demonstrates that the "extension" cannot be regarded as a re-adoption of the agreement, but rather was simply a means of avoiding a strike, and preserving the status quo, until such time as a new agreement could be arrived at. In any case, both the "extension" and the new agreement were executed after this Court's decision in the *American Manufacturing* and *Warrior & Gulf* cases and therefore could be as certainly said to adopt those opinions as the earlier opinion of the Seventh Circuit in the prior litigation.

II. THE PER CURIAM AFFIRMANCE OF THE DECISION BELOW MAY CREATE CONFUSION ON A QUESTION OF LAW WHICH HAS HERETOFORE BEEN CLEARLY UNDERSTOOD BY THE LOWER COURTS.

In *American Manufacturing* and *Warrior & Gulf*, this Court established principles for determining the arbitrability of grievance disputes which have been clearly understood and followed by virtually all the lower courts. The lone exception appears to be the court below, which, in its holdings in this case and in *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 333 F. 2d 761 (1964), has evidenced what we believe is a basic misunderstanding of those principles. Indeed, this Court, subsequent to its *per curiam* decision in the instant case, has reversed *per curiam* the Seventh Circuit's decision in *Kimball*, citing *inter alia American Manufacturing*, No. 535, This Term, 33 U.S.L. Week 3217 (December 14, 1964).

It is clear—from the unanimous reversal of *Kimball* and the denial of certiorari in *General Electric* (*supra*, p. 1)—that this Court does not intend to depart from the principles of *Warrior & Gulf* and *American Manufacturing*. Yet the affirmance without opinion of the decision below may create confusion generally among the lower courts as to the status of those decisions. The opinion below clearly departs from the principles of those decisions, yet this Court has affirmed the decision of the court below.

If, as we believe, the four justices who voted to affirm did so because of the peculiar facts of this case, and not because they agreed with the Seventh Circuit's analysis of *American Manufacturing* and *Warrior & Gulf*, the confusion which may result will be doubly unfortunate.

Accordingly, we urge that rehearing be granted, in the hope that a majority decision can be obtained, and that a clarifying opinion thus would be forthcoming.

III. THIS COURT WILL SHORTLY BE PRESENTED WITH ANOTHER CASE FROM THE SEVENTH CIRCUIT RAISING THE SAME ISSUES AS ARE INVOLVED HERE.

There is presently pending in the Seventh Circuit a case entitled *United Packinghouse Workers* v. *Wilson & Co.*, Docket No. 14467. In that case, a union sought to compel arbitration of a contracting-out grievance under an agreement essentially indistinguishable from the one involved in this case. On June 3, 1964, the following order was entered by the Seventh Circuit in that case:

> "Oral arguments on this appeal were heard by this Court on June 3, 1964, and the case was taken under consideration. The issues herein are substantially the same as certain issues decided by this Court in Independent Petroleum Workers v. American Oil Co., 7 Cir., 324 Fed. 2d 903 (1963). On May 18, 1964 the

United States Supreme Court granted certiorari in the Independent Petroleum Workers case.

"IT IS ORDERED that further action by this Court on the instant case be withheld until the United States Supreme Court has acted on the Independent Petroleum Workers case, and that the instant case be stricken from the current calendar."

Since this Court has now affirmed the Seventh Circuit's decision in the present case, that court can be expected to decide the *Wilson* case in accordance with its prior decision in the present case. We are informed by counsel for the United Packinghouse Workers that, in such event, he intends to file a petition for certiorari seeking reversal of the Seventh Circuit's decision.

Thus, it appears inevitable that the issues presented in this case, which have not really been resolved, will shortly be presented to the Court again in another case.

A similar situation was presented to this Court in 1933 in the cases of *Helvering* v. *Northern Coal Co.; Helvering* v. *C. H. Sprague & Sons Co.; Helvering* v. *U. S. Refractories Corp.;* and *Helvering* v. *Oswego & Syracuse R. Co.;* Nos. 18, 19, 20, and 21, October Term, 1933. In those cases, Mr. Justice Roberts disqualified himself, apparently because his former law firm had represented one of the parties in one of the cases. With only eight Justices sitting, the Court affirmed the decision below by a vote of 4-4, 290 U. S. 591. Subsequently, the Court granted rehearing in all of the cases, after the issue which they involved had been decided in an intervening case in which Mr. Justice Roberts participated. See Petition for Rehearing and Annexed Affidavit of Erwin N. Griswold, Esq. in *Ladner* v. *United States,* No. 2, October Term, 1958.

It would surely be wholly unjust to the petitioner in this case for the Court to let its present decision stand, only to be reversed in the *Wilson* case. Accordingly, we urge the Court, if it is not disposed to grant rehearing of the present

case immediately, at least to hold this petition for rehearing pending the developments in the *Wilson* case. While such action might cause some delay in the ultimate disposition of the present case, such delay would cause no injury whatsoever to the Respondent herein.

IV. THE PARTIES ARE IN EVEN GREATER NEED OF A CLARIFICATION OF THE DECISION IN THIS CASE DUE TO THE SUBSEQUENT DECISION OF THIS COURT IN THE *FIBREBOARD* CASE.

On December 14, 1964, three weeks after the decision in this case, this Court held that contracting out, at least in certain circumstances, is a mandatory subject of bargaining. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, No. 14, This Term, 33 U.S.L. Week 4089. This decision, in holding that an employer has a duty to bargain before laying off its employees and bringing in a contractor's employees to do their work, is directly applicable to many of the contracting out disputes between the Company and the Union. (Indeed, the underlying grievance in the present case involves just such a situation. The Company laid off its crane operators and brought in a contractor's employees to operate the cranes.)

There is already pending before the Board one case in which the Company is charged with contracting out work without bargaining with the Union. *American Oil Company*, 13-CA-5611. In order to decide whether the Company has refused to bargain, the Board must first determine whether contracting out disputes are arbitrable under the parties' collective bargaining agreement. For where an employer has agreed with a union to arbitrate disputes relating to a particular subject, it need not bargain independently of the contractually provided grievance and arbitration procedure. As the Sixth Circuit said in *Timken Roller Bearing Co.* v. *N.L.R.B.*, 161 F. 2d 949, 955-56 (1947):

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement. . . . There is here no restriction in the contract on the obligation of the petitioner to bargain . . . and the petitioner sought not to curtail the process but to utilize the contractual mechanisms for its utilization. . . .
> ". . . [The] effort to channel collective bargaining within the provisions of a contract with the union, was not a refusal to bargain. . . ."

See, to the same effect, *General Motors Corp.*, 149 NLRB No. 40, 57 LRRM 1277, 1279 (1964).

In the present case, the Company contended before this Court that the subject matter of contracting out was not covered by the provision requiring arbitration of grievances as to alleged violations of the agreement or alleged violations of past practice. But it also contended that arbitration was precluded on the ground of collateral estoppel by virtue of the prior litigation. It is impossible to determine which ground this Court relied upon.

The net effect is that it is now impossible for the Board intelligently to decide refusal to bargain cases involving these parties. If this Court has held that contracting out is a subject matter not covered by the agreement, then there is no contractual obstacle to the Board's issuing an order requiring the Company to bargain before contracting out. If, on the other hand, this Court has held only that the Union is barred from proceeding by collateral estoppel, but has concluded that the subject *is* covered by the arbitration provision in the agreement, then under the Act the Company is not obligated to bargain before contracting out.

In short, determination of a refusal to bargain question may well turn on the meaning of the contract. But this Court's decision leaves the meaning of the contract in doubt. It hardly makes sense to require the parties, as well as the Board, to litigate the meaning of the contract through the courts again, to resolve a question which is already here

and which may be disposed of if this petition for rehearing is granted. Clarification of the decision in *this* case will enable the Board to decide *its* case with some assurance of correctness.

V. IN RETROSPECT, IT APPEARS THAT THIS CASE SHOULD NOT HAVE BEEN PLACED ON THE SUMMARY DOCKET.

When the Court granted certiorari herein, it placed the case on the Summary Calendar. Accordingly, counsel was allowed only 30 minutes for oral argument. Had the Court anticipated that there would be such a sharp division in views among its members, we doubt that it would have placed the case on the Summary Docket. Had we anticipated it, we surely would have asked for more time to present oral argument.

There is no way of knowing, of course, whether more extensive oral argument would have led to a majority opinion, rather than an equally divided court. We believe, however, that this case is of sufficient importance — to the parties as well as to the development of a uniform and coherent federal law under Section 301—to warrant further argument, in the hope that a more meaningful decision can ultimately be reached by this Court.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

DAVID E. FELLER